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OPINION NO.2000-38

STATE GAMING CONTROL BOARD; NEVADA GAMING COMMISSION; GAMING; INTERNET: No wager exists where a gaming licensee offers promotional gaming on the Internet in which "play credits" with no cash redemption value are given free of charge and where patrons, in turn, accumulate "casino points" based upon such factors as merely visiting the website or time spent at the website, rather than the outcome of a virtual game. In the absence of a wager, no gaming activity is taking place that requires prior approval of the underlying game by the Nevada Gaming Commission. However, pursuant to NRS 463.01862 and 463.01962, a wager does exist where "tickets," redeemable for cash and non-cash prizes, are awarded based upon the winning outcome of the game being played. Patrons are risking nonnegotiable play credits, at least in part, upon the uncertainty of a winning outcome that entitles them to receive redeemable tickets. As such, an Internet game involving such a wager must receive approval from the Nevada Gaming Commission pursuant to its Regulations 14.230 through 14.250, before being exposed for play to the public, albeit on the Internet.

Steve DuCharme, Chairman
State Gaming Control Board
555 E. Washington Avenue, Suite 2600
Las Vegas, NV 89101

Dear Chairman DuCharme:

On November 27, 2000, a meeting was conducted between yourself, undersigned counsel, Deputy Attorney General Antonia Z. Cowan and representatives from the MGM Mirage (MGM) and Silicon Gaming and its subsidiary, WagerWorks, Inc. (WagerWorks). Following the

meeting, this office was asked to analyze promotional gaming activity proposed for MGM's various Internet websites. To further clarify the proposed operation, a conference call was held with Paul Matthews of Silicon Gaming on November 29, 2000. A subsequent conference call was held with representatives of WagerWorks on December 4, 2000, who characterized the proposal as a "rewards based scheme." Thereafter, on December 11, 2000, WagerWorks provided this office with an updated spreadsheet outlining the play and prize structure of the proposed activity, which is summarized below. Finally, on December 14, 2000, WagerWorks provided a demonstration of the proposed MGM website.

At the outset, it should be noted that this opinion analyzes the proposed operation under Nevada law, but does not analyze the effect, if any, that federal law may have on the MGM's desired Internet activity, including the Wire Act of 1961 or any pending Congressional legislation, such as the Internet Gambling Prohibition Act of 1999, commonly referred to as "The Kyl Bill." *See* 18 U.S.C. § 1084; *see also* S. 692, 106th Cong., 1st Sess. (1999).

FACTUAL BACKGROUND

The MGM, a publicly traded company registered with the Nevada Gaming Commission (Commission) pursuant to NRS 463.635(1)(b), has entered into a contractual relationship with WagerWorks to design a corporate Internet website for the MGM. The intent is to attract a certain class of patrons to the MGM's gaming properties by marketing brand-name recognition through an interactive website. The Internet website would provide incentives consisting of items of value designed to encourage patrons to visit the various MGM gaming properties. Patrons who visit the website will accumulate incentives by:

- (a) exploring the website for corporate information;
- (b) participating in promotions; and
- (c) playing free games that mimic actual casino games both in operation and game outcome.

OPERATIONS

The current proposal uses a complex operational system consisting of the following types of incentives or mechanisms to support the interactive nature of the site: play credits, casino points, tickets, instant win awards and instant sweepstakes qualification. Different incentives would be offered for different types of activities including: visiting the website; responding to marketing inquiries; participating in promotions; and for the play and outcome of the free games as detailed below.

It is important to note that WagerWorks has not established a specific timetable for the implementation of the proposals detailed below. During conference calls, representatives of WagerWorks indicated that it anticipates implementing the proposals in phases over time. The

first step and the only aspects of the proposal that WagerWorks is prepared to make operational

in the near future are the “play credits” and “casino points” that are not dependent upon game outcome.

1. Play Credits

Non-redeemable, numerical “play credits” would be issued at no cost to individual patrons visiting the website. The patrons, in turn, would use the credits to play the free casino games available on the website, and may play one of the offered games by playing from one to five play credits. Play credits would have no value beyond their use for playing the games. In this circumstance, the patron would be issued and reissued credits at no cost as he or she lost them.

2. Casino Points

Patrons would accumulate, free of charge, “casino points” redeemable for awards consisting of room, entertainment, food, merchandise, airline miles, cash or prize packages. Points would be given for visiting the website, as well as for time spent playing a game (e.g., ten casino points accumulated for each minute of play). However, according to WagerWorks, points are not awarded based upon the outcome of any virtual game that may be played. Furthermore, casino points are never at risk of being lost.

3. Tickets

Patrons would accumulate “tickets” to be redeemed for prizes or awards just like casino points though the same type of activities, except that game outcome is determinative of the award. The number of tickets that may be awarded for a winning outcome on a game (e.g., a royal flush) is dependent upon the number of play credits bet by the patron (from one play credit to a maximum of five play credits). Tickets would also be used to participate in sweepstakes, drawings and contests. It is anticipated that the tickets will be implemented in two phases. In Phase 1, tickets would be redeemable for items of value, but the scheme would not utilize the incentive based options of sweepstakes, drawings and contests. Phase 2, however, will incorporate these incentives. Either WagerWorks will operate the sweepstakes or drawings, or a third party under contract to WagerWorks will conduct the activity. It should be noted, that during the December 4, 2000, conference call this office was informed that tickets would not be part of the initial program that is offered and there are no specific plans to implement the tickets in the immediate future.

4. Instant Incentives.

Patrons would be eligible for instant wins and entry into contests, sweepstakes and drawings based on the same type of activities that earn casino points, rather than game outcome. Instant wins and entries would also be randomly allocated among website patrons.

QUESTION ONE

May the MGM, without first seeking prior approval of the underlying game pursuant to Commission Regulations 14.230 through 14.250, offer promotional gaming on its various Internet websites, in which “play credits” with no cash redemption value are given free of charge for use in playing a virtual game and where patrons, in turn, accumulate redeemable “casino points” based on such factors as merely visiting the website or time spent at the website?

ANALYSIS TO QUESTION ONE

“A licensee shall not offer a new game for play unless the new game has been approved by the commission.” Nev. Gaming Comm’n Reg. 14.230(1). NRS 463.0152 defines a “game” or “gambling game” to mean:

[A]ny game played with cards, dice equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value, including, without limiting the generality of the foregoing, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck, Chinese chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, any banking or percentage game or any other game or device approved by the commission, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by charitable or educational organizations which are approved by the board pursuant to the provisions of NRS 463.409.

NRS 463.0152 (emphasis added). “Gaming” or “gambling” generally means to expose for play any game defined in NRS 463.0152. *See* NRS 463.0153.

In order to find gaming or gambling activity, a wager must be made. A “wager” is defined as “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.” NRS 463.01962. A “representative of value” means, “any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash.” NRS 463.01862.

The Nevada Supreme Court has distinguished between gambling transactions in which a wager is present and simple contracts involving a prize. In *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961), a public offer was made to pay \$5,000 to any person having paid 50 cents who shoots a hole in one at a golf course. “[G]enerally . . . the offer of a prize to a

contestant who performs a specified act is not invalid as being a gambling transaction.” *Gibson*, 77 Nev. at 27. The offer to pay upon performance of the specified act is a promise and the performance of the requested act constitutes acceptance and consideration that gives rise to a

legally enforceable contract. *Id.* at 28. The court held that a prize differs from a wager because, if he abides by the offer, the person offering the prize has no chance to gain back the thing being offered. On the other hand, each party to a wager has a chance of gain and a risk of loss. *Id.*

In *State, Gaming Comm'n v. GNLV Corp.*, 108 Nev. 456, 834 P.2d 411 (1992), the Supreme Court revisited its decision in *Gibson* and again held that a wager requires at least two parties, who each have a risk of loss and a chance of gain. *GNLV Corp.*, 108 Nev. at 457-458. In so holding, the court found that 50-cent tickets that were automatically awarded for every 75th dollar wagered were not the result of a legitimate wager. The tickets, which the patrons used to purchase certificates that could, in turn, be redeemed for cash and non-cash items, were merely prizes offered by the casino which it had no chance to win back. The award of tickets was mandated by the terms of the slot club contract and not by the uncertain outcome of a game.

Here, the Internet games will be available without charge to patrons. Although the outcome of a particular game played may be uncertain, the awarding of redeemable casino points is not. The MGM has no ability to win back the cash or non-cash prizes, since these items are offered to the patrons by virtue of visiting the website or time spent at the website playing a particular game. Therefore, no wager exists. If a wager is absent, then no gaming transaction can occur. As such, no game or gambling game is being exposed for play by the MGM on its Internet websites which would require prior approval of the Commission pursuant to its Regulations 14.230 through 14.250. Like the scheme in *Gibson* or the slot club in *GNLV Corp.*, the MGM is merely offering to the public a prize or casino points that are redeemable for cash and non-cash rewards.

CONCLUSION TO QUESTION ONE

Under the scenario described above, a wager does not occur. The visitor to the Internet website who chooses to play a game does so for entertainment purposes, and the MGM has utilized another vehicle in which to market its brand name and properties. The mere act of visiting a website or time spent at a particular website entitles the visitor or patron to accumulate redeemable "casino points." The MGM cannot win back these casino points by the very nature of its offer. *See Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 28-29, 359 P.2d 85 (1961). Moreover, the casino points are not awarded based upon the uncertain outcome of a game. *See* NRS 463.01962 (defining "wager"); *see also* NRS 463.01862 (defining "representative of value"). As such, no "game" or "gambling game" is being operated. *See* NRS 463.0152 (defining "game" or "gambling game"). If no game or gambling game is being operated or exposed to the public for play, then the MGM is certainly not engaged in "gaming" or "gambling" activity on the Internet in which the underlying game or games would require prior approval of the Commission pursuant to its Regulations 14.230 through 14.250. *See* NRS 463.0153 (defining "gaming" or "gambling").

QUESTION TWO

Under the same facts outlined in Question One, may the MGM also award redeemable “tickets” based upon the patron achieving a winning outcome of his or her use of play credits without first seeking prior approval of the underlying game pursuant to Commission Regulations 14.230 through 14.250?

ANALYSIS TO QUESTION TWO

Our analysis must start with the initial inquiry of whether a “wager” exists. In 1997, the Legislature adopted a new definition of “wager” to include not only sums of money “risked on an occurrence for which the outcome is uncertain,” but also “representatives of value.” NRS 463.01962; *see also* Act of July 17, 1997, ch. 689, § 4, 1997 Nev. Stat. 3497. A “representative of value” means, “any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash.” NRS 463.01862.

Prior to 1997, a wager in Nevada required a sum of money or something of value to be risked by the patron. In *Harrah’s Club v. State, Gaming Comm’n*, 99 Nev. 158, 659 P.2d 883 (1983), the court held that promotional activities, such as free slot play or lucky bucks, etc. did not create wagering transactions, because “[t]he casino patron has no ‘stake’ at risk in these promotional ‘wagers,’ as they cost the patron nothing.” *Harrah’s Club*, 99 Nev. at 160. Therefore, nonnegotiable items such as chips, tokens or coupons that are given free of charge to the patron to induce gambling, which could not be redeemed for cash, did not create a wager when presented for play. *Id.* at 160-161. Since the patron had not risked anything to play the game, the Supreme Court held that no legitimate wager could be found.

The legislative change in 1997, which was urged by the Nevada Resort Association, was significant because it was a substantial and fundamental departure from our traditional tenets of gaming and, specifically, the basic conceptual elements of a gambling transaction or event in Nevada. No longer did a patron have to risk a sum of money or other thing of value to create a gaming contract or, more accurately, a wager. As long as the casino was willing to accept the item for play, even nonnegotiable or no cash redemption value items, a wager could be created. This change revolutionized our understanding of what constitutes a wager and directly impacted the determination of a licensee’s gross gaming revenue that is subject to taxation under NRS 463.370.

The new definition of wager was sought, in part, based upon a bankruptcy decision in 1995. Specifically, the Sixth Circuit Court of Appeals held that a wager exists even if there is no cash redemption value in the thing being played, because it nevertheless has “wagering value” as evidenced by the legally enforceable contract rights that arise from the casino’s acceptance. *In re Chomakos*, 69 F.3d 769, 771 (6th Cir. 1995); *see also* Minutes of May 20, 1997, hearing on A.B. 419 before the Assembly Committee on Judiciary at Exhibits B, E.

Play credits, like nonnegotiable chips or tokens, have value, since they constitute representatives of value or instrumentalities used by the patron that are accepted by the MGM. *See id.*; *see also* NRS 463.01862. Given this factual wrinkle, a patron who plays the Internet games offered does so, at least in part, by risking play credits upon the chance or uncertain occurrence of a winning outcome that would entitle him or her to receive a ticket redeemable for cash and non-cash rewards. As such, a wager would exist. *See* NRS 463.01962. Thus, the activity of playing an Internet game would constitute gaming or gambling. That is to say, the MGM would be exposing for play a game as provided for in NRS 463.0152. *See* NRS 463.0153. Consequently, the Internet game, whatever it might be, would require prior approval of the Commission before being offered to the public for play pursuant to Nevada Gaming Commission Regulations 14.230-14.250.

Alternatively, the MGM could seek to have the proposed scheme administratively approved as a “promotional device” if the MGM were to reconfigure the ticket aspect of the games. The award of tickets would have to comply with the provisions of Commission Regulation 14.210 governing promotional devices.

A “promotional device” is merely some sort of contrivance that possesses the attributes of a gaming device or a slot machine, but “(a) Is playable without a wager being made; or (b) Always pays out an amount in either cash or prizes that is equal to or greater than the wager made.” Nev. Gaming Comm’n Reg. 14.210(1). A “gaming device” is “*any equipment or mechanical, electromechanical or electronic contrivance, component or machine used remotely or directly in connection with gaming or any game which affects the outcome of a wager by determining win or loss, including a slot machine.*” NRS 463.0155 (emphasis added); *see also* NRS 463.0191 (defining “slot machine”).

Here, the equipment, presumably a computer and/or a file server or other related components, which are used to produce, operate and maintain the MGM’s Internet websites certainly constitute electronic equipment that is being used in connection with a game, such as virtual blackjack, roulette or some other traditional casino game identified in NRS 463.0152. It is this equipment that determines the win or loss of any given game being played and, in turn, awards tickets accordingly (depending upon the number of play credits wagered). Since the play credits have no value except for wagering purposes, the redeemable tickets that will be awarded will always be equal to or greater than the value of the play credits being wagered at any one time. As long as tickets are always paid out, then the related electronic or computer equipment may be administratively approved pursuant to the conditions that the Board Chairman deems appropriate or necessary. *See* Nev. Gaming Comm’n Reg. 14.210(1).

CONCLUSION TO QUESTION TWO

Nonnegotiable or non-redeemable “play credits,” like nonnegotiable chips, tokens, etc. given free of charge in a casino, have value. They constitute a representative of value or an instrumentality used by the patron, which is accepted by the MGM. *See* NRS 463.01962; *see also* NRS 463.01862. Under these factual circumstances, play credits could be risked, at least in part, upon the uncertainty of a winning outcome that would entitle the patron to receive a redeemable “ticket.” Therefore, a wager would exist and the activity of playing a game, albeit on the Internet, would constitute gaming or gambling. *See* NRS 463.01962; *see also* NRS 463.0153. As such, the underlying game itself, whether it is virtual blackjack, poker, roulette or any other game provided for in NRS 463.0152, requires prior approval of the Commission before being offered to the public for play. *See* Nev. Gaming Comm’n Regs. 14.230-14.250.

Alternatively, the MGM could seek to have the proposed scheme administratively approved as a “promotional device” if the MGM were to reconfigure the ticket aspect of the games. Instead of tickets being awarded on a game outcome determinative basis or upon a winning outcome, the tickets would need to be distributed on each and every play in an amount that is equal to or greater than the free credits being wagered by the patron. *See* Nev. Gaming Comm’n Reg. 14.210(1).

QUESTION THREE

Under the same facts outlined in Question Two, except that accumulated, redeemable “tickets” also entitle the patron to an equal number of chances in a sweepstakes or drawing, would such a proposal constitute a permissible “promotional scheme” that is conducted by the MGM in connection with a licensed gaming activity pursuant to NRS 462.105(2)?

ANALYSIS AND CONCLUSION TO QUESTION THREE

The noted exceptions to Nevada’s prohibition on lotteries are those prize distribution schemes conducted by charitable or nonprofit organizations or those “conducted by a licensed gaming establishment in direct association with a licensed gaming activity. . . .” NRS 462.105(2); *see also* NRS 462.105(1); Nev. Const. art. 4, § 24. In the latter, the prize distribution offered by a licensed gaming establishment does not constitute a lottery, but rather a “promotional scheme.” *See* NRS 462.105(2).

Here, the analysis turns on the simple inquiry of whether the proposed promotion will be offered by the MGM in direct association with licensed gaming activity. As discussed fully in Question Two, the Commission does not currently license the Internet gaming activity that is directly connected to the proposed promotion. Until such time as the Commission licenses the Internet games, any drawing, sweepstakes or related prize distribution associated therewith is impermissible as a matter of law. Furthermore, if approved someday, any person or entity hired by the MGM to operate the contest would have to be registered with the Board pursuant to NRS 463.0169.

QUESTION FOUR

May the MGM award prizes or entries into sweepstakes or drawings on a random basis to patrons as “instant incentives” or instant wins, rather than as a factor of game outcome?

ANALYSIS AND CONCLUSION TO QUESTION FOUR

Unlike the tickets described in Question Two or the related contest set forth in Question Three, the “instant incentives,” which entitle the patron to receive a prize or entry into a sweepstakes or drawing, are randomly awarded rather than based upon the uncertain outcome of gambling game. Therefore, instant incentives are not the product of a wagering activity. *See* NRS 463.01962. As fully discussed above, if a wager is absent, then no gambling is taking place nor is a gambling game being exposed for play. *See* NRS 463.0153; *see also* NRS 463.0152. Likewise, the instant incentive program would not qualify as a “promotional scheme” under NRS 462.105(2) since it not being conducted in direct association with gaming activity, licensed or otherwise.

Sincerely,

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